IN THE SUPREME COURT FOR THE STATE OF ALASKA

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Appellants, v. GOVERNOR MICHAEL J. DUNLEAVY, in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Appellees.	Supreme Court Case No. S-18333

Trial Court No. 3AN-22-04028 CI

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT AT ANCHORAGE, THE HONORABLE ADOLF ZEMAN PRESIDING

REPLY BRIEF OF AMICUS ALASKA LEGISLATIVE COUNCIL

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I. INTRODUCTION

Appellees seek to dismantle the Higher Education Investment Fund ("HEIF") by "sweeping" its assets into the Constitutional Budget Reserve ("CBR") because the funds are purportedly "available for appropriation" under article IX, section 17(d) of the Alaska Constitution. Appellees' arguments misapprehend the essential character of the HEIF and the governing legal principles.

Monies that the Legislature already validly committed to a purpose and which have been expended are not subject to section 17(d)'s sweep.[1] The Legislature validly committed the HEIF's funds to the establishment of an endowment "investment fund" to provide a reliable, long-term funding source for Alaskan students' scholarships and grants. Endowments are fundamentally different from other funds set up by the Legislature because, by design, an endowment generates investment income to fulfill its purpose. In order for the HEIF to realize its purpose, the Department of Revenue was required to — and did — expend hundreds of millions of dollars to purchase income-generating non-cash assets so that seven percent of the HEIF's assets could be distributed annually to fund grants and scholarships. The Legislature chose this endowment structure precisely because it demonstrated a long-term commitment to Alaskan students and would give those students confidence that future funding would be available. Absent that durable commitment, Alaskan students were less likely to remain in Alaska to pursue higher education. The endowment effectuates and realizes

[1] *See Hickel v. Cowper*, 874 P.2d 922, 930–31, 935 (Alaska 1994).

the Legislature's purpose by creating a durable, sustainable funding source. These funds have been validly committed and are not "available" under section 17(d), and thus they may not be swept.

II. ARGUMENT

The Court interprets section 17(d) to "give it a reasonable and practical interpretation in accordance with common sense and consonant with the plain meaning and purpose of the provision and the intent of the framers."[2] As explained below, the intent of the framers and the purpose of section 17(d) is to preserve pre-existing state programs like the HEIF, rather than introducing additional instability into the budgeting process by dismantling decade-old services. In addition, the reasonable and practical interpretation of section 17(d) confirms that an endowment fund like the HEIF is not subject to the sweep. Unlike certain other funds that were found to be sweepable, the monies in the HEIF have been fully expended with the purchase of a customized portfolio of non-cash assets that makes this endowment a reality. Because the Legislature validly committed these monies to the creation of a durable funding source for future scholarships and grants, they are not "available" to be swept. The alternative interpretation favored by Appellees would unreasonably and impractically handcuff the Legislature from creating the long-term funding source that Alaskan students require in order for any scholarship or grant program to be effective.

[2] *Legislative Council v. Knowles*, 988 P.2d 604, 607 n.11 (Alaska 1999) (internal quotation omitted).

A. The Framers' and Voters' Intent to Preserve the Stability of Existing State Programs Through Section 17 Is Not Disputed.

In its opening brief, the Legislative Council demonstrated that the intent of the framers and the extrinsic indications of the voters' probable understanding of section 17(d) clearly showed that both understood the constitutional provision would not require the elimination of pre-existing state programs like the HEIF.[3] Appellees make no attempt to rebut this. The most that Appellees say on this point is that sections 17(b) and 17(d) should be interpreted the same, albeit with a necessary "adjustment."[4] That, of course, is precisely the Legislative Council's point. When this Court previously considered the evidence regarding the framers' intent and the voters' probable understanding of section 17(b), it concluded that eliminating state services and liquidating state assets was not considered a necessary prerequisite to simple majority access to the CBR.[5] This makes sense in light of the amendment's clear purpose in bringing stability to the state's budgeting process. It follows that section 17(d) similarly should be interpreted and understood not to require the elimination of state services (like the HEIF) or liquidation of state assets (like the HEIF's diversified portfolio) to repay the CBR.

Appellees assert that the purpose of section 17 is to protect the CBR as a rainy-day fund for stabilizing state budgets and to ensure it is replenished when funds are

[3] Amicus Brief of Alaska Legislative Council ("Amicus Br.") at 7–9.
[4] Brief of Appellee State of Alaska ("Appellee Br.") at 30–34, 36–37.
[5] *See Hickel*, 874 P.2d at 929.

available to do so.[6] This is mostly accurate, with the caveat that section 17 does not achieve this purpose at the expense of pre-existing state programs like the HEIF. To do otherwise would run counter to the undisputed budgetary stabilizing goal of section 17. Just as it is inconsistent with the framers' and voters' intent to require the Legislature to dismantle and de-fund state programs before it can access the CBR with a simple majority vote, it is inconsistent with the framers' and voters' intent to require the destruction of an existing, previously funded programs like the HEIF in order to replenish the CBR a little more quickly.

B. The HEIF Is Unlike the Restricted Funds Cited by Appellees.

Appellees offhandedly dismiss the HEIF as merely an "accounting designation" or an "accounting tool" whereby monies are initially appropriated into an account until such time as those monies are spent outside of the treasury (on scholarships or grants, for example).[7] In Appellees' view, the HEIF is thus indistinguishable from certain restricted funds that were found to be "available for appropriation" in *Hickel.*[8] This fundamentally misapprehends the HEIF's structure, which is necessary for it to achieve its intended purpose.

For the past decade, the HEIF has served a vital role in incentivizing Alaska's best and brightest young minds to continue their education in Alaska. Through the

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[6] Appellee Br. at 37.
[7] *See id.* at 23 & n.88.
[8] *See id.* at 24–27.

HEIF, thousands of deserving students receive scholarships or grants to attend qualified postsecondary educational institutions each year.[9]

Keeping Alaska's best and brightest students in Alaska requires more than a one-year scholarship. While annual scholarships and grants obviously are a prerequisite to help keep students in Alaska, they are not sufficient. Postsecondary education is a multi-year endeavor, and students (and their families) understandably need to know what sort of financial aid may be available to them in the future when they are deciding which institution to attend. The legislative history confirms that many students were unwilling to gamble on an education funding model that relied on annual decisions by the Legislature and Governor to establish a funding source for grants and scholarships, and those students elected instead to pursue educational opportunities in the Lower 48.[10] In response, the Legislature intentionally created the HEIF's endowment structure to provide more reliable funding, which it concluded was essential for the program's success. Every year students can count on seven percent of the HEIF's market value being made available for scholarships and grants.[11] In short, the unique structure of the HEIF gave (and continues to give) Alaskan students confidence and comfort that the State will support their Alaskan educational dreams, thus prompting students to apply for and receive these scholarships. The creation and funding of the HEIF as an

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[9] Exc. 8 (noting that roughly 5,000 Alaskan students receive scholarships and grants annually that are funded by the HEIF). Certain Alaskan medical students also receive forgivable loans through the WWAMI program. *Id.*
[10] Amicus Br. at 11–12.
[11] AS 37.14.750(c).

endowment fund with a specified portion of its assets annually available to fund Alaskans' post-secondary education achieves that purpose, as reflected by the success of the scholarship and grant programs.

Contrary to the State's argument,[12] this endowment model is a unique characteristic that differentiates the HEIF from the restricted funds that were considered "available for appropriation" under *Hickel.*[13] Each of those funds had "the same general structure" whereby an "initial appropriation" of cash was made to the fund that would wait for an indefinite period in the fund, earning interest, until the monies were appropriated for some particular purpose.[14]

The Railbelt energy fund "consists of money appropriated to it by the legislature and interest received on money in the fund."[15] The Legislature can appropriate money from the fund for assorted programs, projects, and expenditures to assist in meeting Railbelt energy needs.[16] It was not created as an endowment fund, structured to provide a steady, long-term income stream for a particular purpose.

Likewise, the Alaska marine highway system vessel replacement fund "consists of money appropriated to it by the legislature" and "[i]nterest received on money in the fund [that] shall be accounted for separately and may be appropriated into the fund

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[12] *See, e.g.*, Appellee Br. at 22–27 (arguing that funds "like the HEIF" have been deemed "available for appropriation"; these other funds are not like the HEIF).
[13] *Hickel*, 874 P.2d at 933 (listing the Railbelt energy fund, the Alaska marine highway system vessel replacement fund, and the educational facilities maintenance and construction fund).
[14] *Id.*
[15] AS 37.05.520.
[16] *See id.*

annually."[17] Again, the fund is a "rainy day fund," holding money for an indeterminate time until the Legislature decides to appropriate any amount it chooses for refurbishment, acquisition, or replacement of state ferry vessels.[18] The appropriated funds were not committed to create an endowment, with only a portion of the assets intended for annual appropriation.

Finally, the educational facilities maintenance and construction fund "consists of all money appropriated to it" and those amounts shall be invested by the Department of Revenue.[19] Again, the fund was not set up as an endowment. Instead, the Legislature can appropriate money from the fund to finance the design, construction, and maintenance of public school facilities or to maintain University of Alaska facilities without limit.[20]

The entire purpose of each of these funds was to create an accounting entry within the general fund until the monies were ultimately disbursed, following an appropriation, for one project or another. Only then would the monies be expended.

This stands in marked contrast to the HEIF's endowment model. Its funds were not parked in an accounting entry while awaiting future deployment. They were immediately committed to their purpose, which was to create an "investment fund" that would generate sufficient "income earned on investment of fund assets"[21] to fund

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[17] AS 37.05.550(a).
[18] *See id.*
[19] AS 37.05.560(a), (b).
[20] AS 37.05.560(b).
[21] AS 37.14.750(a)(2).

thousands of scholarships prospectively. Accordingly, the Commissioner of Revenue is obliged to determine "appropriate investment objectives" for the HEIF and "establish investment policies to achieve the objectives."[22] Practically speaking, this means that the Commissioner of Revenue must — and did — purchase hundreds of millions of dollars in revenue-producing non-cash assets in a customized portfolio that will generate (and have generated) the necessary returns to fund these scholarships and grants.[23]

Unlike the above funds referenced in *Hickel*, the HEIF is not a place where monies are parked until they are ultimately spent on a project. Rather, the initial appropriation into the HEIF and the subsequent purchase of these non-cash assets *was* itself an expenditure. Through the creation of the HEIF endowment and the expenditures on these non-cash assets, the Legislature has "purchased" Alaskan students' confidence in the reliability of the program that was lacking under the former annual appropriation model (to which Appellees prefer to return). As prior experience under that former annual appropriation model demonstrated, the scholarship and grant programs are ineffective if students choose not to apply because they find the likelihood of continuing scholarship and grant availability too "tentative" to base their choices

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[22] AS 37.10.070(a)(2), (3). Appellees mistakenly quote article IX, § 17(a) (but cite AS 37.14.750(a)) in saying that the HEIF statute does not direct that its assets be used to purchase any specific thing. *See* Appellee Br. at 26 & n.94. While the HEIF statute does not specify a particular investment that must be purchased, it does direct a specific goal (i.e., funding of scholarships and grants with seven percent of the fund's assets). Only if the funds the Legislature appropriated to the HEIF remain there can that goal be reached. The Commissioner of Revenue is directed by AS 37.10.070(a) to determine the appropriate means of obtaining that objective.

[23] Exc. 273.

about educational institutions. The funding of the HEIF and the purchase of a customized portfolio of revenue-producing assets solved that problem. The HEIF is thus not an "accounting designation" — it is the result of an appropriation deliberately made to create a scholarship and grant program that would be effective in accomplishing the Legislature's intent. It made thousands upon thousands of scholarships and grants possible while simultaneously providing the necessary assurances to Alaskan students and their families that these scholarships and grants will be available indefinitely into the future.

In this way, the HEIF bears a much closer resemblance to the oil and hazardous substance release response fund ("OHSRRF"), which *Hickel* concluded was not "available" under section 17 and which Appellees do not discuss.[24] With the OHSRRF, the Legislature may make initial or annual appropriations into the fund, and the fund receives interest on those appropriations and certain other payments.[25] The commissioner of the relevant state agency (the Department of Environmental Conservation) was authorized to expend those funds in furtherance of the fund's purpose without further legislative action.[26] Because the Legislature had made the fund available for expenditure without further Legislative action, the amounts deposited into the fund

[24] *See Hickel*, 874 P.2d at 933 (citing AS 46.08.010).
[25] AS 46.08.020(a), (b).
[26] AS 46.08.040(a). Notably, the OHSRRF does not require the Commissioner of the Department of Environmental Conservation to expend funds outside of the treasury. He or she may instead transfer funds to another department for use. *See* AS 46.08.040(a)(2)(H).

were deemed validly appropriated and were no longer "available" for section 17 purposes.[27]

Like the OHSRRF, the Legislature made an appropriation into the HEIF so that the Commissioner of Revenue could expend those monies on a customized portfolio of income-producing non-cash assets to effectuate the endowment.[28] The endowment's utility and success is predicated upon these expenditures. The HEIF is even less "available" than the OHSRRF because not only is the Commissioner of Revenue *authorized* to expend the HEIF's initial appropriation, she (or more accurately her predecessor from a decade ago) *already expended* those monies to purchase the non-cash assets that now constitute the HEIF.

Appellees' arguments to the contrary illustrate their fundamental misunderstanding of the HEIF's purpose. Appellees claim that the HEIF is "surplus" because it "is funded far beyond any expected annual scholarship need."[29] To state the obvious, the roughly $400 million in the HEIF is not intended to pay for "annual scholarship need." If these funds were meant simply to cover the cost of scholarships and grants on an annual basis, then only a small fraction of that amount would have been required. But that approach does not work, as the Executive Director of the Alaska Commission on Postsecondary Education already testified.[30] When Appellees' preferred funding approach was in place, many students opted not even to apply for

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[27] *Hickel*, 874 P.2d at 933.
[28] *See supra* notes 21–22.
[29] Appellee Br. at 25 & n.92.
[30] Amicus Br. at 11 & n.39.

these potential grants or scholarships because they lacked confidence in the funding mechanism. The amounts contained in the HEIF are clearly not surplus precisely because any endowment, by definition, must have considerably more in the corpus than it pays out to beneficiaries in any given year.[31] Given that the HEIF paid out roughly $29 million for scholarships and grants for 2021–22 [Exc. 272], it follows that the corpus should be roughly $400 million so that the HEIF can continue to make these payments annually with a reasonable rate of return. What Appellees call "surplus" is, in fact, the endowment itself. The HEIF is working exactly as intended and is continuing to achieve the purpose that the Legislature envisioned for it back in 2012.

Hickel's discussion of the OHSRRF also demonstrates that Appellees' dedicated funds argument is a strawman.[32] The fact that the HEIF is not a dedicated fund[33] is irrelevant to the section 17 analysis. As *Hickel* confirms, the Legislature can create a non-designated fund — like the OHSRRF or the HEIF — that is "nominally established within the general fund" but that will not be swept under section 17(d) because the fund is available for expenditure without further legislative action.[34] Appellees incorrectly focus on the Legislature's ability to access money from the HEIF if it chooses to, claiming that the HEIF is available for appropriation because "funds like the HEIF can

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[31] *See* ENDOWMENT, Black's Law Dictionary (11th ed. 2019) ("A gift of money or property to an institution (such as a university) for a specific purpose, esp. one whose principal is kept intact indefinitely and only the interest income from that principal is used.").
[32] *See* Appellee Br. at 24–26.
[33] AS 37.14.750(b).
[34] *Hickel*, 874 P.2d at 933.

always be spent on any purpose to which the legislature might appropriate them."[35] But *Hickel* is clear on this point. The proper focus is on what *someone other than the Legislature is authorized to do* with the money in the fund. The Legislature of course remains free to access the corpus of the HEIF or the OHSRRF for appropriation to another purpose if it chooses.[36] The determinative question is whether the Legislature authorized expenditure of the corpus of the fund without further legislative action. For the HEIF, it did.[37]

C. *Hickel* Supports the Non-Sweepability of the HEIF.

Hickel holds that "monies which have already been validly committed by the legislature to some purpose should not be counted as available"[38] and "counting funds already validly appropriated to a specific purpose as still 'available' would disrupt existing state programs and would constitute an inflexible constitutional intrusion on the legislature's authority to evaluate the wisdom of particular appropriations."[39] The

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[35] Appellee Br. at 27.

[36] As *Hickel* recognized, the Legislature can access virtually all net assets held by the State, however liquid. *See Hickel*, 874 P.2d at 928. Accessibility does not equate to "availability" for purposes of the section 17 analysis.

[37] As the Legislative Council explained in its opening brief, the annual appropriation made for scholarships and grants from seven percent of the HEIF's corpus may be subject to being analyzed differently. Amicus Br. at 16. Unlike the HEIF's funds committed to being invested in an endowment fund, the annual seven percent of the assets available to fund scholarships and grants requires Legislative appropriation before it is spent on its purpose — scholarships rather than funding an endowment. But the outcome is nevertheless the same because those funds only become available for appropriation in early July, *after* the sweep has already occurred. *See* Amicus Br. at 17–18. Accordingly, unless the scholarships and grants have not been issued by the following June 30, the seven percent is not subject to the sweep.

[38] *Hickel*, 874 P.2d at 930–31.

[39] *Id.* at 930.

Hickel Court was "unwilling to read [such a constitutional intrusion] into a provision with quite a different purpose."[40] The HEIF funding was validly committed by the Legislature a decade ago to creating an endowment for scholarships and grants to Alaskan students. Applying the Appellees' misinterpretation of section 17(d) would disrupt — and, indeed, destroy — existing state programs, leaving thousands of Alaskan students in the lurch, which is precisely the opposite of what the Legislature sought to do when it created the HEIF. It is, in effect, the very type of second-guessing of the Legislature's evaluation of the wisdom of particular appropriations that *Hickel* aimed to avoid.[41] Given that the purpose of section 17 was to instill greater *stability* in state budgeting, it makes little sense to interpret section 17(d) so as to require the destruction of a state program like the HEIF. Under *Hickel*, these funds are not available to be swept under section 17(d).

Appellees raise a scattershot of arguments as to why the Court should interpret section 17(d) to destroy the HEIF, but none has merit. Appellees first elevate form over substance in arguing that the HEIF is merely an investment fund, not a scholarship program, and is thus not an existing state program.[42] Not so. The HEIF is the funding source for these scholarships and grants; if the HEIF is eliminated, the scholarships and grants will terminate unless an alternative funding source is located.[43] Appellees'

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[40] *Id.*
[41] *See id.* at 931 n.20.
[42] Appellee Br. at 24.
[43] AS 14.43.915(a), (b). The Governor has expressed a willingness to fund scholarships on a year-to-year basis for now, Exc. 64–75, but that is precisely the same annual

preferred interpretation of section 17(d) will disrupt this state program and leave these students with uncertain prospects for continuing their education. Alaskan students recognize the importance of this state program, which is why the appellants brought suit.

Appellees next argue, without explanation, that the HEIF is not free from dependence on annual funding by the Legislature and the Governor.[44] But that is the very nature of an endowment. The HEIF does not depend on annual funding to perform its duty. By law, the appropriations to the HEIF do not lapse.[45]

In an effort to characterize the HEIF as an "available" fund, Appellees also argue that *Hickel* found that an "appropriation" under section 17 requires that the expenditure of money remove the money from legislative control.[46] Not so. No state asset or fund is ever removed from legislative control; even after authority to expend is given, the Legislature can revisit its prior appropriations.[47]

Appellees' chief critique appears to be that the dedicated funds prohibition in article IX, section 7 means that the HEIF's funds could be used for some purpose other than the funding of scholarships and grants and therefore there is no "guarantee" of continuing scholarship availability.[48] As noted above, this is a strawman argument. "Availability," under section 17, does not mean any asset that the Legislature could

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appropriations model that failed to inspire confidence in Alaskan students previously. *See* Amicus Br. at 11 & n.39.

[44] Appellee Br. at 24.

[45] AS 37.14.750(a).

[46] *See* Appellee Br. at 31 & n.120.

[47] *Cf. State v. Fairbanks N. Star Borough*, 736 P.2d 1140 (Alaska 1987).

[48] *See* Appellee Br. at 20 n.78, 24–25.

choose to appropriate differently.[49] Of course the Legislature retains authority to decide how best to use the State's assets through its appropriation power, whether for the HEIF or virtually any other non-dedicated fund or asset. The point is that the Legislature validly committed these funds to the HEIF for the ongoing funding of scholarships and grants and then ensured that those funds were expended on non-cash income-generating assets that would make that endowment workable. In the ten years since, the Legislature has consistently determined that this decision remained appropriate. The fact that the Legislature could theoretically deviate from this consistent approach does not suddenly render these funds available to be swept.[50] Similarly, *Hickel* confirms that the Legislature's occasional decision to appropriate a portion of the HEIF for other purposes does not render the remainder of this excluded fund "available" for section 17 purposes.[51]

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[49] *See, e.g.*, *Hickel*, 874 P.2d at 928 (rejecting interpretation of section 17 that would require all net assets held by the State, however liquid, to be considered "available"); *id.* at 930 (noting that, while "all funds might be available by some means," funds that were already appropriated to a valid purpose should not be considered "available").

[50] *Id.* at 930–31 n.20 ("To do otherwise would be to continue to count sums of money as 'available for appropriation' after they have been appropriated, so long as they have not been paid out or converted from cash to some other type of asset. Instead, we recognize that any given sum of money can only be appropriated once during a given time period."). In any event, the HEIF has been converted from cash to other types of assets, including real assets, fixed-income securities, and equities. *See* Exc. 273.

[51] *Hickel*, 874 P.2d at 931 n.20 (noting that an appropriation from an excluded fund to another purpose only impacts the newly appropriated funds).

III. CONCLUSION

The HEIF is a unique endowment fund that was deliberately designed and structured to give Alaskan students assurances that scholarships and grants would be available in the future. The Legislature directed the Commissioner of Revenue to purchase non-cash income-generating investments that would make this endowment a reality. Other than the OHSRRF, it is unlike any of the funds addressed by this Court in *Hickel*. The funds in the HEIF are not available to be swept because they have been validly committed to a durable, reliable endowment program to benefit Alaskan students. Given that section 17(d) was meant to *stabilize* the budgetary process — and not to disrupt existing state programs — this Court should find that the HEIF is not sweepable under section 17(d).